Supreme Court, U.S.
FILED
MAR 2 1992
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No. 91-1240

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1991

DANIEL ENGELKE,

Petitioner,

v.

GREGORY A. SCHER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

IS THE EIGHTH AMENDMENT VIOLATED IF A PRISON GUARD REPEATEDLY SEARCHES AN INMATE'S CELL FOR NO PRISON NEED EXCEPT FOR THE SOLE PURPOSE OF CALCULATED HARASSMENT OF THE INMATE?

II.

IS A PUBLIC OFFICIAL ENTITLED TO THE PROTECTION OF QUALIFIED IMMUNITY WHEN THE UNLAWFULNESS OF HIS CONDUCT IS APPARENT IN THE LIGHT OF PRE-EXISTING LAW?

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STATEMENT OF THE CASE

During the relevant period of the acts complained of by Gregory A. Scher, respondent, he was an inmate and Daniel Engelke, petitioner, was a prison guard at the Missouri Eastern Correctional Center ("MECC") at Pacific, Missouri. Respondent's action against petitioner and other Missouri Department of Corrections officials stems from their efforts to retaliate against and harass respondent because he reported another prison guard, James H. Smith, who attempted to force respondent to provide Smith with a source of contraband weapons and threatened the lives of respondent and his family if respondent failed to do so.

Respondent and his brother reported this matter to prison officials, including the prison's institutional investigator, Ron Kennedy, for several months, and finally, a plan was developed to provide proof of Smith's actions. Respondent fully cooperated with Kennedy and his fellow officers: respondent gave Smith a note with information on it purporting to be a source for the contraband weapons. On September 30, 1985 the note was found in Smith's hat while he was leaving the institution. Taking anything out of the prison by staff is prohibited by policy.

Smith was transferred to tower duty after the note was found. After he made calls from the tower to inmate Ron Cooper threatening respondent, he was put on administrative leave. Smith resigned as a guard just before he would have been dismissed.

Kennedy was only concerned with violation of technical prison rules which forbid staff from (i) taking anything out of

the prison, such as the note, and (ii) making calls to inmates inside the prison. Kennedy never investigated the contents of the note about Smith's expressed interest in obtaining contraband weapons or the substance of the phone calls concerning Smith's threats to cause harm to respondent.

Prior to the incident involving Smith, respondent had never been cited by MECC officials for any conduct violations and in fact was chosen for, and participated in, that prison's expectancy program for honor inmates, held various jobs at MECC and was a paid employee of St. Louis Community College. After the incident involving Smith, respondent was the object of repeated cell searches by petitioner which were undertaken solely for purposes of harassment and without connection to any prison purpose.

Petitioner searched respondent's cell ten times in nineteen days solely to harass respondent. On three occasions petitioner left plaintiff's cell in disarray; defendant took pens and paper from plaintiff; and petitioner cited him for a bogus conduct violation. Defendant had no credible reason to conduct these searches other than harassment.

Petitioner testified that he was instructed to confiscate metal coat hangers and clotheslines from inmates' cells and that he found the former in respondent's cell. Yet, petitioner did not cite respondent for any conduct violation for, and he did not query plaintiff as to how he obtained, same.

It is manifest that petitioner's testimony as to his supposed purpose was not credible. Clearly, the jury and the trial court attached no credibility to it. Although petitioner searched plaintiff's cell ten times in nineteen days -- during which entire time and for months prior thereto a television set was in plain view -- petitioner only confiscated same on his tenth search and then only after another staff member, whose name he could not remember, supposedly told him to do so. Petitioner then issued a conduct violation to respondent because the television set was not identified on respondent's property list, notwithstanding the fact that respondent did not claim the television set as his. More revealingly, respondent's roommate was not issued a conduct violation altnough the record shows the t.v. was being lent to him and his property list was devoid of any mention of it. Petitioner then incredibly testified that the conduct violation was issued to plaintiff because he volunteered for it.

Clearly, no legitimate prison purpose was served by these acts.

The jury found that petitioner's actions constituted cruel and unusual punishment in violation of the prohibitions of the Eighth Amendment; the district court ratified the jury's finding by its own review and denial of defendant's motion for judgment notwithstanding the verdict, or in the alternative, a new trial; the appellate court affirmed the district court's denial; and the

appellate court en banc denied petitioner's petition for rehearing.

SUMMARY OF ARGUMENT FOR REASONS FOR DENYING THE WRIT

The judgment by the jury, as ratified by the district court and affirmed by the appellate court, must be affirmed because petitioner conducted repeated cell searches for the sole purpose of calculated harassment which constituted cruel and unusual punishment and thereby violated the Eighth Amendment; and because petitioner is not entitled to qualified immunity because such acts violated clearly established constitutional rights.

I. THE EIGHTH AMENDMENT WAS VIOLATED BY PETITIONER'S REPEATED CELL SEARCHES BECAUSE THEY BORE NO CONNECTION TO PRISON NEED AND WERE FOR THE SOLE PURPOSE OF "CALCULATED HARASSMENT"

The Eighth Amendment protects prisoners from obdurate and wanton searches. Hudson v. Palmer, 468 U.S. 517 (1984); Whitley v. Albers, 475 U.S. 312, 319-20 (1986).

No prison need was served by petitioner's repeated searches of respondent's cell and bogus conduct violation. It is this complete lack of any recognizably legitimate prison purpose whatsoever that reveals the obduracy and wantonness of petitioner's acts. Petitioner did not conduct a solitary search

but rather a constant stream of searches for the sole purpose of harassing respondent.

Prior to his cooperating with prison officials about guard Smith's conduct, respondent was a stellar inmate, having been awarded and found deserving of the maximum privileges available to an honor inmate. However, as soon as respondent cooperated with prison officials to rout out the potentially felonious acts of defendant Smith, petitioner undertook his harassing conduct.

In Whitley, this Court stated the standard for determining whether prison authorities' conduct violates the Eighth Amendment prohibition of cruel and unusual punishment.

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishment Clause. . . .

Whitley, 475 U.S. at 319-20.

Respondent fully recognizes the restrictions on an inmate's liberty attending life as an inmate. Respondent does not complain that prisons are not run like country clubs; that his tender sensitivities and feelings were hurt by petitioner's error in good judgment or other impolite, indelicate, or inadvertent action; that petitioner violated his right to privacy of his person, cell and effects; or that petitioner has no obligation or right to take reasonable action to maintain or restore the security of the prison.

Rather, petitioner's petition -- just like his appeal and defense below -- arrogantly and coldly seeks this Court's imprimatur on his malicious ad terrorem acts against respondent. The issue before this Court is simply whether petitioner violated respondent's rights under the Eighth Amendment by conducting ten cell searches over nineteen days and confiscating insignificant items as revealed by petitioner's failure to cite respondent for conduct violations for same, all for the purpose of harassing plaintiff; there was no prison disturbance, no threat to prison security, no alleged breach of institutional rules by respondent or any other inmate or other legitimate prison need.

Petitioner erroneously asserts that only the infliction of significant pain is required as a prerequisite to finding an Eighth Amendment violation. Petitioner mistakenly relies upon Whitley, 475 U.S. at 319, Ingraham v. Wright, 430 U.S. 651, 670 (1977) and Estelle v. Gamble, 429 U.S. 97, 102, 103 (1976) and misquotes from same.[1] This Court actually stated in Estelle:

> *Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible*

[1] At page seven of petitioner's petition, he erroneously asserts that only the infliction of pain violates the cruel and unusual punishment clause of the Eighth Amendment and cites Estelle, Ingraham and Whitley as support therefor. While Whitley correctly quotes from Ingraham, Ingraham does not [and neither does Wilson v. Seiter, 501 U.S. ___, 111 S. Ct. 2321, 2323 (1991)] accurately quote from Estelle. This matter was corrected by this Court in Hudson v. McMillan, 929 F.2d 1044 (5th Cir. 1990); cert. granted, ___ U.S. ___, 111 S.Ct. 1579 (1991), No. 90-6531, slip. op. at 8 (February 25, 1992) as discussed herein. Petitioner's petition cites page 671 from Ingraham and it should be page 670; and the citation to page 103 of Estelle should be to pages 102 and 103.

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with "evolving standards of decency that mark the progress of a maturing society, "...or which "involve the unnecessary and wanton infliction of pain,"....(Internal quotations omitted; emphasis ours.)

Petitioner fails to acknowledge as violative of the Eighth Amendment "punishments which are incompatible of 'evolving standards of decency that mark the progress of a maturing society'" -- the very standard re-embraced by this Court in Hudson v. McMillan. Moreover, petitioner's discussion of "significant inquiry" and reliance on its hoped-for decision by this Court [i.e., affirming the Fifth Circuit's decision in Hudson v. McMillan, 929 F.2d 1014 (5th Cir. 1990)][2] may be disregarded in light of this Court's reversal of the Fifth Circuit.

In another case miscited by petitioner[3], Cowans v. Wyrick, 862 F.2d 697, 700 (8th Cir. 1988), the Eighth Circuit stated:

. . . the jury must have found that plaintiff suffered anguish, misery or pain in

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[2] Petitioner's petition, p. 15.

[3] See pp. 7 and 8 of petitioner's petition. Reading the entire case, it is manifest that the Eighth Circuit's reference to "some measure of pain of some type" (862 F.2d at 699) is later explained as comprehending "anguish, misery or pain" (862 F.2d at 700).

order to establish that a cruel and unusual punishment was inflicted. (Emphasis ours.)

Consequently, the applicable standard is not premised upon pain. Moreover, petitioner is not required to leave a telltale sign on respondent's person; he is only required to inflict anguish, misery or pain upon respondent and he did so. As cited in Whitley, it is the "obduracy and wantonness" of the acts that characterize the prohibitions of the Eighth Amendment. Absent a legitimate prison need, the "obduracy and wantonness" of petitioner's acts are manifest.

The Court must keep in mind that respondent was an honor inmate before the Smith incident. He was accorded the respect he earned by his laudatory behavior prior to that time. Moreover, petitioner testified that he had no reason to believe respondent was involved with contraband or in violation with other prison policy when he undertook his repeated searches into plaintiff's cell.

The primary cases relied upon by petitioner relate to situations which offer no guidance to the Court in this case, namely: shooting an inmate during a prison disturbance involving the taking of a prison official as a hostage, Cowans; stripping an inmate to his underwear and placing him in an isolation cell pending investigation of an alleged breach of institutional rules, Rodgers v. Thomas, 879 F.2d 380 (8th Cir. 1989); striking of an inmate which was found accidental, Wyatt v. Delaney, 818 F.2d 21 (8th Cir. 1987); physically restraining an inmate after

he refused to cooperate with the officials and resisted efforts to handcuff him, Pressly v. Gregory, 831 F.2d 514 (4th Cir. 1987); an inmate's claim of a single occurrence of harassment which never went to trial and never was submitted to a jury, but rather decided on the officer's motion for summary judgment, Black Spotted Horse v. Else, 767 F.2d 516 (8th Cir. 1985); and the solitary event of pushing an inmate and spitting on hair clippers before giving him a hair cut, Sampley v. Ruettgers, 704 F.2d 491 (10th Cir. 1983).

None of these cases are factually similar to the one herein. No prison disturbance was underway during the repeated cell searches; respondent was neither being punished for violation of any institutional rules, failing to cooperate nor resisting being handcuffed; and a series of events, rather than a solitary one, was involved herein. Petitioner's cases simply are not pertinent. All respondent did was to cooperate with prison officials in exposing Smith's malicious and potentially felonious acts which violated prison policy. The proper case law to be considered in this appeal is that involving cell searches and each of the decisions on this issue can be distinguished from that appealed herein. Respondent does not claim violations of the Fourth Amendment against unreasonable searches and seizures or the Fourteenth Amendment regarding deprivation of property. The issue before this Court involves violation of the cruel and unusual punishment clause under the Eighth Amendment and under no other amendment.

Hudson v. Palmer involved a solitary "shakedown" search of the inmates locker and cell for contraband which resulted in discovery of a ripped pillow case in the trash can. Petitioner cites Palmer v. Hudson, 697 F.2d 1220 (4th Cir. 1983) (petitioner's petition, p. 18), but fails to acknowledge that the Fourth Circuit reversed the district court's summary judgment relative to the Fourth Amendment finding that there was a genuine issue of material fact as to whether the "shakedown" of the inmates property was justified or conducted solely for purposes of harassment. The Fourth Circuit stated:

> In assessing the validity of a proffered justification for a search, a court should, of course, consider direct proof offered by the plaintiff that the search was impermissibly motivated, by a desire to harass or humiliate him, such as evidence of other acts of harassment by the defendant.

697 F.2d at 1225.

This case involves not just a solitary shakedown, but "other acts of harassment" -- nine "other acts of harassment" or cell searches -- with no validity proffered by petitioner or found by the courts below. Hudson v. Palmer was founded upon the Fourth Amendment, and yet the Supreme Court clearly states that violation of the Fourth Amendment protection against unreasonable search and seizure is not a prerequisite to a violation of cruel

and unusual punishment under the Eighth Amendment. The court stated:

> Our holding that respondent does not have a reasonable expectation of privacy enabling him to invoke the protection of the Fourth Amendment does not mean that he is without a remedy for calculated harassment unrelated to prison needs nor does it mean that prison attendants can ride rough shot over inmates property rights with impunity. The Eighth Amendment always stand as a protection against "cruel and unusual punishments".

468 U.S. at 530.

Consequently, whether the acts of petitioner constitute a violation of the Fourth Amendment is irrelevant; such is not necessary to satisfy the protection afforded by the Eighth Amendment. Moreover, petitioner's acts cannot be viewed in a vacuum -- they must be considered in relation to the prison's needs.

Subsequent court decisions -- relied on by petitioner below -- embraced Hudson v. Palmer on this very issue. The District Court for the Southern District of New York ruled in Balabin v. Scully, 606 F.Supp. 176, 184 (S.D.N.Y. 1985):

> It is true that in ruling out a Fourth Amendment claim by prisoners in Hudson, supra, the Supreme Court explicitly refused

> to preclude an Eighth Amendment claim for harassment given the appropriate circumstances.

In Balabin, the district court found that plaintiff had made no allegations of harassment nor alleged facts suggesting an invasion of privacy that might rise to the level of cruel and unusual punishment. On this basis, the Balabin court dismissed plaintiff's Eighth Amendment causes of action. This starkly contrasts with the case appealed herein in that respondent's claims were not only not dismissed, but were sufficient to support: (1) a jury verdict in respondent's favor; (2) the district court's denial of petitioner's motion for judgment notwithstanding the verdict, or in the alternative, a new trial; and (3) the appellate court's affirmation by panel and en banc.

Similarly, the Ninth Circuit in Vigliotto v. Terry, 873 F.2d 1201, 1203 (9th Cir. 1989) embraced the above quoted language from Hudson v. Palmer and Whitley.

> The Eighth Amendment protects prisoners from searches conducted only for "calculated harassment".

The Vigliotto court could only find proof of a solitary search; despite general allegations of a number of harassing searches, the prisoner in Vigliotto did not substantiate same through proof. The Ninth Circuit stated "we hold this single incident is insufficient to satisfy Whitley." 873 F.2d at 1203. The record

herein is uncontroverted and uncontested as to petitioner's repeated searches.

Furthermore, taken in the light of Whitley, petitioner's obdurate and wanton acts are exactly the type of "calculated harassment unrelated to prison needs" which violates the cruel and unusual punishment prohibition of the Eighth Amendment.

The district court found under the standards set by Hudson and Whitley that "there is evidence from which the jury could have found that defendant Engelke's conduct constituted cruel and unusual punishment." (Appendix 3, petitioner's Petition A22).

II. A PUBLIC OFFICIAL IS NOT ENTITLED TO THE PROTECTION OF QUALIFIED IMMUNITY BECAUSE THE UNLAWFULNESS OF HIS CONDUCT IS APPARENT FROM PRE-EXISTING LAW

Petitioner argues that he is protected by qualified immunity.

Under Harlow v. Fitzgerald, 457 U.S. 800 (1982), a prison official is entitled to immunity from damage, unless his conduct violated a clearly established constitutional right which a reasonable person would have known[4].

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[4] The standard has been more recently addressed by this Court in a case cited by petitioner, Anderson v. Creighton, 483 U.S. 635, 640 (1987), ("... in the light of pre-existing law the unlawfulness must be apparent"), but that case is of little relevance here as it expressly limited to "allegedly unlawful warrantless searches of innocent third parties' homes in search of fugitives." 483 U.S. at 646.

Applying that standard to the underlying facts herein, it is clear that petitioner violated clearly established constitutional rights as enunciated in Hudson v. Palmer. Moreover, when there is no legitimate prison need being served, prison officials acts are even more circumscribed. Whitley.

As set forth above, this Court has found that "calculated harassment" unrelated to prison needs can constitute cruel and unusual punishment under the Eighth Amendment. 468 U.S. at 530. Petitioner's searching of plaintiff's cell ten times in nineteen days for the sole purpose of harassment which the jury found to be the case and the district court affirmed in its denial of Plaintiff's motion for judgment notwithstanding the verdict, or in the alternative, a new trial, manifests that petitioner's obdurate and wanton conduct inflicted anguish and misery upon respondent and thereby violated clearly established constitutional rights.[5]

CONCLUSION

In a vacuum, any one of petitioner's searches may not seem unconstitutional. But, taken together in the context of the total absence of any legitimate prison need, petitioner's acts are unconstitutional and unconscionable and accordingly, this Court must deny petitioner's petition.

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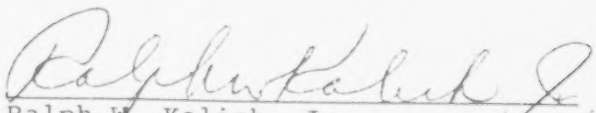
[5] Petitioner's reliance on Siegert v. Gilley, __ U.S. __, 111 S. Ct. 1789 (1991) is curious at best. The D.C. Circuit Court of Appeals, as well as this Court, concluded that the district court should have dismissed Siegert's suit. Herein, however, petitioner's claims of the violation of his constitutional rights herein were sufficient to satisfy a jury, the district court and the court of appeals.

For the above-stated reasons, this Court is respectfully requested not to grant a writ of certiorari.

Respectfully submitted,



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2/29/92